No. 356.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Eleanor C. Huntington,

Appellant.

vs.

The City of Nevada et al.

Appellees.

Brief of Respondents and Appellees.

A. D. Mason,
J. M. Walliag,

Solictors for Respondents and Appellees.

Filed the 18th day of June, 1897.

..... Clerk.

Nevada City Daily Transcript Print.

No. 356.

In the United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

ELEANOR C. HUNTINGTON,

Appellant,

vs.

THE CITY OF NEVADA ET AL.,

Appellees.

Appeal from the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

BRIEF OF APPELLEES.

The Complainant as a femme sole, filed her Bill in the Circuit Court praying that an injunction be issued enjoining the City of Nevada and its Board of Trustees from proceeding further in the matter of issuing Bonds for the purpose of establishing and constructing water

works for the use of the citizens of the municipality.

Respondents appeared in said action, and filed therein, a general demurrer to Complainant's Bill, on the ground "that the Bill of Complaint herein, does not state facts sufficient to constitute a cause of action against respondents, or either of them."

After hearing in the Circuit Court, Respondents' demurrer was sustained, and Complainant declining to amend, her Bill was dismissed and final decree entered in favor of Respondents.

Thereupon this appeal was taken.

The contention in this case involved but a single question which may be properly stated as follows: Has the City of Nevada the authority to issue the Bonds referred to in Complainant's Bill, for the purpose of erecting and constructing water works to be owned by the municipality?

Appellant contends that the City has no such authority, while Appellees maintain that it possesses the authority to issue and sell the bonds referred to, under and by virtue of the provisions of the Act of the Legislature of the State of California entitled, "An Act authorizing the incurring of indebtedness by Cities, Towns and Municipal Corporations, incorporated un-

der the laws of this State," Approved March 19th, 1889, and amendments thereof, approved March 11th, 1891, March 19th, 1891, and March 1st, 1893.

In support of the Contention of Appellant, she seems to rely upon the case of Desmond vs. Dunn, 55 Cal. 243, and on the case of P. W. Murphy vs. the City of San Luis Obispo, et al., decided May 20th, 1897, by the Supreme Court of the State of California, reported in "California Decisions" of date May 26th, 1897, being volume 13, No. 811.

This case, Desmond vs. Dunn, arose under the McClure Charter to San Francisco. The Supreme Court seem to hold that Charters adopted prior to the new Constitution are not subject to be controlled by general laws. That Section 6 of Article 11 of the Constitution of 1879, applies only to Charters framed under the new Constitution. The Charters framed prior thereto remain in force until changed by the mode prescribed thereby.

The above case, Desmond vs. Dunn, has been frequently cited since it was decided by the Supreme Court of this State, viz: Earl vs. San Francisco Board of Education, 55 Cal. 495, in the concurring opinion of Judge Myrick. In this case it was held by the Supreme Court that the

educational department would be subject under the Constitution, to general laws passed for that purpose.

In the case of Barton vs. Kallock et al., 55 Cal. 104, the case is cited as authority that the election of the officers of San Francisco, is not required by law to be held in 1880, under General laws.

In Wood vs. Election Commissioners, 58 Cal., 569, the case of Desmond vs. Dunn is cited to the point: that the Consolidation Act of San Francisco cannot be vacated by any general act of incorporation, until a majority of electors determine to organize under it, but the City is not free from legislative control, and is subject to general laws so far as elections are concerned.

The case is again cited in the case of Donohoe vs. Graham, 61 Cal., 281. This case decided that the street law of San Francisco of 1872 was inconsistent with the Constitution of 1879 and therefore superseded.

The case of Desmond vs. Dunn is cited in the dissenting opinion of McKinstry, Justice.

In the case of Staude vs. Election Commissioners, 61 Cal., 320, Desmond vs. Dunn was relied upon, and the Supreme Court held that "whether the City and County elects to organize under such general laws or to continue its existence under the Consolidation Act, it

is subject to and controlled by general laws; for in the same section of the Constitution, in which the then existing City and Town organizations are recognized, and the continuance of their existing charters permitted, it is declared that "CITIES OR TOWNS HERETOFORE OR HEREAFTER ORGANIZED AND ALL CHARTERS THEREOF FRAMED OR ADOPTED BY AUTHORITY OF THIS CONSTITUTION, SHALL BE SUBJECT TO AND CONTROLLED BY GENERAL LAWS." The framers of the instrument meant something when they inserted this language in it, and we are not at liberty to hold they did not mean what they said. Giving, as they did, to all cities and towns, and cities and counties, the rights to organize under a general act of Incorporation, which the Legislature was directed to pass, or to continue their existence under their existing charters as they might elect, they nevertheless said that whichever course should be pursued, such cities and towns, and cities and counties, should be subject to and controlled by general laws—such general laws as should be passed by the Legislature, other than those for the "incorporation, organization and classification of cities and towns."

In the case of In Re Carrillo, 66 Cal., 5, Desmond vs. Dunn is cited to the point that the Charter of the City of San Jose of 1874 remained in force, regardless of the adoption of the Constitution of 1879, and the Legislative Acts of 1880, relative to Courts of Justice, etc., as there was no showing that a Police Judge had

been elected, but "the City itself and the Charter of the City were therefore subject to the provisions of the General Laws of 1880."

Desmond vs. Dunn again came before the Supreme Court in the case In Re Guerrero, 69 Cal., 100. The same question was presented in this case as in 66 Cal., 5, Supra, as to Judicial officers. The real question was as to the validity of a liquor license ordinance.

In the case of Thomasson vs. Ashworth, 73 Cal., 73, Desmond vs. Dunn was again cited. This case holds that general laws as to street work control the Charter of San Francisco of 1872, that corporations are subject to general laws.

Again, in the case of City of Stockton vs. Insurance Company, 73 Cal., 624, the Court says:

"We do not mean to imply that the Legislature, even by a general law, can substitute an entirely new Charter for an old one without the consent of the people of the locality. To that extent, we understand the decision in Desmond vs. Dunn, (Supra) to be the law." This case related to a municipal tax.

In People vs. Pond, 89 Cal., 143, Desmond vs. Dunn is cited as authority that City Charter controlled, as no election has been had to change the same. This was the case of an application for a writ of Mandate to com-

pel the Registrar and Election Commissioners to count certain votes for certain persons as Police Commissioners.

Appellant contends that Desmond vs. Dunn is still recognized as law by the Supreme Court of the State of California. To a limited extent, we think that this contention is correct, but an examination of the cases cited wherein Desmond vs. Dunn has been commented upon, leads to the couclusion that it is law only in so far as it holds that general laws passed by the Legislature changing the "Incorporation, organization and classification" of cities and towns do not supersede the provisions of the Charters of such cities and towns, but that in all other matters, except incorporation, organization and classification, the Charters of cities and towns, whether enacted before or subsequent to the adoption of the Constitution of 1879, are subject to be controlled by general laws.

If our contention as to the true construction to be placed upon Desmond vs. Dunn is correct, then we submit that instead of that case being an authority in favor of Appellants position, viz: that the City of Nevada cannot incur an indebtedness in excess of $2,000, because its Charter, approved in 1878, prohibited its Board of Trustees from incurring any indebtedness which should exceed $2,000, it clearly is an authority holding that in all matters except those of incorpora-

tion, organization and classification, the City is controlled by and subject to the provisions of general laws passed by the Legislature for the government of cities and towns, regardless of whether the City was organized prior or subsequent to the adoption of the Constitution of 1879.

The provision of the Charter of the City of Nevada, which Appellant claims limits the authority of the Board of Trustees and of the City to incur an indebtedness, is set out in the Bill of Complaint herein as follows: "Said Board of Trustees shall not contract any liabilities, either by borrowing money, loaning the credit of the City or contracting debts, which, singly or in the aggregate, shall exceed the sum of $2,000." (See Trans., Page 21.)

Appellees contend that this provision of the Charter, even if a limitation upon the power of the Board of Trustees, in their capacity as such, that it is not a limitation upon the power of the City to incur an indebtednes s where such indebtedness is incurred by a vote of the citizens, qualified electors of such municipality.

It was no doubt a wise provision so far as limiting the authority of the Board of Trustees to contract debts on behalf of the City, but it seems to us clear it is a forced construction, to hold that by reason of

the provision above quoted, the voters of the City could not, in accordance with general law, contract a greater debt.

Indeed, we think, that instead of being a limitation upon the power of the City, as such to contract debts, in accordance with the provisions of general laws, it was a clear delegation of authority to the Trustees to contract debts on behalf of the City to an amount not exceeding $2,000 without being under the necessity of submitting the question of the incurring of such indebtedness to the voters.

At the close of Appellant's brief, and as a P. S., Appellant says: "Since the foregoing brief has been in the hands of the printer, the Supreme Court of California has rendered an elaborate opinion, filed May 20th, 1897, in the case entitled P. W. Murphy, Plaintiff and Appellant vs. the City of San Luis Obispo et al., Defendants, which deals with the whole subject of the issuance of bonds of municipalities, * * * * and, in our judgment, it is determinative of the case at bar in favor of the Plaintiff in this action."

An examination of the case will show that there were but three grounds of attack upon the bonds in question in that case, and the Commissioner who wrote the opinion has clearly stated the points involved as follows: "First: That the bonds are made payable in

"Gold Coin of the United States," instead of 'Gold Coin or lawful money of the United States.' Second: That the question as to whether the interest on the bonds would be payable annually or semi-annually, was not submitted to the voters. Third: That the voters voting for said bonds voted by stamping a cross opposite the proposition submitted to them, instead of indicating their wish by writing 'Yes' or 'No' opposite the proposition they desired to vote for."

We are almost tempted to conclude that Counsel for Appellant was misinformed as to this case. As we read the opinion, it nowhere attempts to deal with the question of whether or not general laws control the provisions of the Charter of Incorporated cities or towns.

Indeed, the clear effect of this decision is to hold that a general law passed by the Legislature in 1889 was controlling as to the method to be pursued in elections held for the purpose of bonding a municipality.

It will be observed that the same Act provided that the Legislative branch of the City should, by ordinance, "fix the day on which such special election shall be held, the manner of holding such election, and the voting for or against incurring such indebtedness; such elections shall be held as provided by law for holding

such elections in such city, town or municipal corporation."

The Supreme Court held that the provisions of the Charter as to the method and manner of holding such elections controlled, because the Statute of 1889 provided that such Charter provisions should control.

Again, we call attention of the Court to the fact that the Charter of San Luis Obispo was adopted in 1884, under the general incorporation law of 1883, and as is evident from the opinion provided the method to be pursued in voting at City elections.

In the case at bar, no question is presented analagous to any one of the three propositions involved in the case of Murphy vs. the City of San Luis Obispo.

That, *all municipal corporations are subject to the will of the Legislature*, and liable to be controlled by general law, will be found supported by a very large array of authorities, a few of which we cite, as well as by the provisions of the Constitution itself.

Section 6, Article 11, of the Constitution provides: "*And cities and towns heretofore or hereafter organized and all Charters thereof, framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws.*"

Prior to the adoption of the Amendment of November 3d, 1896, the above was the reading of Section 6, so far as quoted.

Section 12, Article 11, reads as follows: "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, *but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.*"

In the language of the Supreme Court of the State of California in the case of Staude vs. Election Commissioners, 61 Cal., 320, Supra, "the framers of the instrument meant something when they inserted this language in it, and we are not at liberty to hold that they did not mean what they said."

The language is plain and unambiguous, expressly declaring that all cities and towns are subject to general laws, and that all cities or towns might be empowered by the Legislature to levy and collect taxes for municipal purposes. This the Legislature have done, and by the Acts approved March 19th, 1889, and the Acts amendatory thereof, and it is admitted that in this case the Board of Trustees of the City of Nevada have com

plied in all particulars with the provisions of said respective Acts.

In the case of Rice vs. Board of Trustees, 107 Cal., 398, the question of the right of the town of Haywards to incur an indebtedness in excess of the amount of the annual tax levy was before the Supreme Court. In that case, the Supreme Court held that the Municipal Indebtedness Act of 1889 is controlling in the cases provided for therein. In speaking of the Municipal Indebtedness Act of 1889, the Supreme Court says: "*That Act is a general Act, and makes provision for just such contingencies as that confronting the authorities of the town of Haywards in this instance.*"

In the case of the People vs. Henshaw, 76 Cal. 436, the Supreme Court said: "The decision of this Court in Thomasson vs. Ashworth, 73 Cal., 73, renders it unnecessary for us to dwell upon the question of the right of the Legislature to pass general laws affecting municipal corporations without reference to whether such corporations were formed before or after the Constitution of 1879."

At the time of the rendition of this decision, the City of Oakland was existing under an Incorporation Act approved March 25th., 1854, and therefore prior to the adoption of the present Constitution.

In the case of Thomasson vs. Ashworth, 73 Cal., 73,

the Supreme Court directly passed on Section 6, Article 11 of the Constitution, and held that the Legislature has power to pass a general law affecting the Charter of the City and County of San Francisco, *without the consent of such City and County.*

In the case of Santa Cruz vs. Enright, 95 Cal. 105, the Supreme Court says: "It may be conceded for the purposes of this decision, that the Charter of the City of Santa Cruz confers no authority upon the municipal authorities to condemn water for the use of the inhabitants of the City. Its warrant for the exercise of the power is found in the Constitution and general laws of the State. Section 6 of Article 11 of the Constitution provides that "cities or towns heretofore or hereafter organized, and all Charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws."

And again, on page 112, the Court says: "And the Act of March 19th, 1889, which is also a general law, provides how indebtedness for such works may be secured and paid by municipal corporations."

By reference to California Blue Book for 1895, page 278, it will be found that Santa Cruz was Incorporated by Special Act of the Legislature in 1876.

And in the same case it is held that certain Sections of

the Code of Civil Procedure and the Civil Code are "general laws applicable to municipal corporations which were formed before, as well as to those which were formed after the adoption of the Constitution of 1879."

If the Code Sections cited by the Supreme Court in this case apply to corporations whose Charters had been granted prior to the adoption of the Constitution of 1879, it is difficult to understand why a general law adopted by the Legislature in 1889, is not also applicable to such corporations.

In the case of In Re Wetmore, 99 Cal. 146, the Supreme Court declare that "the provisions of the Act of March 19th, 1889, are general in their character, and give to every municipal corporation incorporated under the laws of this State, the power to create a bonded indebtedness for any of the purposes authorized by the Act."

In the case of Davies vs. The City of Los Angeles, 86 Cal., and on page 41, after quoting that portion of Section 6, Article 11, of our Constitution hereinbefore recited, the Court says: "The language of this latter Section is plain and unambiguous and cannot be ex-explained away by any reasoning, however ingenious."

See also Derby vs. City of Modesto, 104 Cal. 515.

That all municipal corporations are subject to the

will of the Legislature, (see also Dillon on Mun. Cor., Secs. 52, 80.)

The City of Nevada is a public or municipal corporation.

"A municipal corporation is but a branch of the State Government, and is established for the purpose of aiding the Legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the Legislature to determine the extent to which it will confer upon such corporation, any power to aid it in the discharge of the obligation which the Constitution has imposed upon itself." Harrison, Judge, In Re. Wetmore, 99 Cal., 150.

"The Charter or Incorporating Act of a municipal corporation is in no sense a contract between the State and the corporation." 1 Dill. Mun. Cor. Sec. 54, 3d Ed.

Notwithstanding this, the learned Counsel for Appellant contend that this public corporation is not subject to the control of the Legislature which created it. That because it was incorporated prior to 1879—the new Constitution's adoption—it has passed beyond Legislative control and its Charter fixes its authority, franchises and powers, and is in fact the alpha and omega thereof.

(See Appellant's Br., Pg. 3, 4 and 23).

Not only this, but necessarily then, all the other municipal corporations of this State incorporated prior to 1879, occupy this anomalous position, and are beyond Legislative control. "They must disincorporate and their citizens elect to re-incorporate under the general Municipal Act of 1883" or else the Legislature has no control or power over them. (See Page 4, Applt's Brief).

One proposition, we submit, is clear and beyond question, viz: that if the Legislature possesses any power or authority over this class of municipal corporations, if it may enlarge, contract or abrogate their corporate powers, it must do so by a general law and not by a Special Act. (See Cal. Con. Art IV, Sec. 25, and many of the above cases.)

As it is said by McFarland, Justice, in one of the late cases cited ante, this Constitutional inhibitation against special legislation is so broad as to almost cover all subjects of legislation. If the Legislature then is invested with such sower, it could only exercise it through general laws. Had the Legislature such power?

Says Dillon: "In the language of Chief Justice Marshall, when the whole interests and franchises are the exclusive property and dominion of the Government it-

self, such as quasi corporations, (so called), counties and towns or cities, upon which are conferred the powers of local adminstration, there are public corporations. *The power of the Legislature over such corporations is supreme and transcendent;* it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require." 1 Dill. Mun. Cor., Sec. 54, post.

See Note 2, Sec. 54, Dill. Mun. Cor., and in People vs. Morris, 13 Wend. 325, where the defendant insisted that the rights and privileges conferred upon a city by the Act incorporating it were vested, and could not be impaired by subsequent legislation. Nelson, Judge, said: "It is an unsound and even absurd proposition that political power conferred by the Legislature can become a vested right against the Government in any individual or body of men."

"A municipal corporation in which is invested some portion of the admistration of the Government, may be changed *at the will* of the Legislature.

Per McLean, J., 16, U. S. 369:

"The special powers conferred upon them are not vested rights as against the State, but being only political, exist only during the will of the general Legislature; otherwise, there would be numberless petty Gov-

ernments existing within the State and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the Legislature, either by a general law operating upon the whole State, or by a special Act altering the powers of the corporation. It may enlarge or contract its powers or destroy its existence."

End of Note 2: "Since the Legislature cannot alienate any part of its legislative power, it cannot therefore by legislative act or contract, invest any municipal corporation with an irrevocable franchise of government over any part of its territory."

Yet, as seen, the learned Counsel claim that by the Act of incorporation, the Legislature has so irrevocably fixed the powers of the City of Nevada, that it cannot enlarge or contract such powers by any legislation whatever; Nevada City is outside the pale of the law until she surrenders her Charter.

As to absolute "legislative control to create, change, modify or destroy the powers of public corporations." See also 15 A. & E. Enc. of Law, Page 976, Sec VI and notes.

The law in question, called the "Municipal Improvement Law," has repeatedly been before the California Supreme Court, and that Court has thus construed it,

per Harrison, Judge, In Re Wetmore, 99 Cal. 150.

"The provisions of the Act of March 19th, 1887, are general in their character, and give to every municipal corporation incorporated under the laws of this State, the power to create a bonded indebtedness for any of the purposes authorized by the Act."

The words are spoken ex-cathedra in construing the Act, and determining to what it relates. A cursory reading of this case will show the fallacy of the narrow construction placed on this Act by opposing Counsel.

See also, 104 Cal. 515, Derby vs. City of Modesto.

91 Cal. 549, City of San Luis Obispo vs. Haskin.

"Every municipal corporation," etc., means the old as well as the new.

Skinner vs. City of Santa Rosa, 107 Cal., 464, was a case in which the Defendant City was incorporated even before Appellee, viz: 1872; yet the applicability of this law to that city is not questioned. Many other of the authorities cited are decisions upon this law, some under Charters before, others after the New Constitution, and in every one it appears that the Supreme Court construes this Act as general and applicable to all cities.

Thus see, City of Santa Cruz vs. Enright, 95 Cal., 105.

Santa Cruz was incorporated in 1876. Read page 112, last sentence of first paragraph, and cases before cited.

Among the enumerated powers conferred upon the Trustees of the City of Nevada, by its Act or Incorporation, by the terms of Subdivision 20 of Section 8, is the following: "To provide for supplying the City with water and regulate the sale and distribution thereof, provided that this provision shall in no manner alter or affect any contract or contracts heretofore made with any parties or corporation for supplying of said City or any part thereof, with water, but all such contracts shall be and remain in full force and virtue."

By the Charter, power is given to the Board of Trustees to provide for supplying the City with water, and under the Act of 1889, and Acts amendatory thereof, the method of procedure is provided, and no claim is made in this case but what the Trustees have fully complied with the provisions of such Acts.

In the case of Ellenwood vs. City of Reedsburg, 64 N. W., Rep. 885, the Supreme Court of Wisconsin says: "Revised Statutes, Section 942, provides that any city may issue its bonds for the erection of water works

or to accomplish any other purpose within its lawful power. The Reedsburg City Charter, (Section 1), provides that it shall have the powers possessed under the general Statutes. Sections 119 and 129 provide that the City shall contract no debts exceeding the revenues of the Fiscal year, except as expressly authorized by Charter. Held, that the City had power to issue bonds in the manner provided by law, for the erection of water works and an electric light plant."

Rules of Construction of State Statutes.

U. S. Courts are bound by the decisions of the State Supreme Court as to the construction of Statutes of the State.

Hancock vs. Louisville & N. R. Co., 145 U. S., 409.

Pullman Car Co. vs. Penn., 141 U. S., 18.

The greater part of Appellant's Brief is devoted to the proposition that Desmond vs. Dunn lays down the doctrine that a municipal corporation organized under the old Constitution is not subject to be controlled by general laws passed thereafter. This doctrine it seems to us is clearly overruled and repudiated by the Supreme Court of this State, and that no further citation of authorities on that point is necessary. The later

cases clearly lay down the law that all municipal corporations, being the creatures of the Legislature, are subject to be controlled by general laws passed, except as to the three matters of *organization, incorporation* and *classification.*

As the Act of 1889 did not purport to affect and does not affect the corporation Act of the City of Nevada, in either of these particulars, we submit that it is controlling, and the Acts of the City Trustees, Respondent, valid and legal.

That the Legislature intended the Act of 1889 to relate to all cities, the following quotations therefrom will show, viz: Sec 1. "Any city." Sec 2: "Any city." Sec. 3. "Any municipality." Sec 7. "The Legislative branch of any city, etc." Sec. 9. "Every city, town, etc." Sec. 11. "Any municipality." These excerps clearly show the intention of the Legislature to make this Act applicable to all cities.

Counsel, however, seem to think the Legislature did not mean, and further, did not have the right to affect Charter provisions by said Act. The first of these propositions is answered by the Act itself. Thus Section 12 provides (after expressly repealing certain municipal improvement Acts therefore passed) "*And all general acts or special acts or parts of Acts conflicting with this Act are hereby repealed.*"

To what do the words "*special acts refer*" if not to Charters?

The citation made by opposing counsel, viz: 1 Dill Mun. Cor., Sec 87, shows that the Legislature may, by a general law, repeal Charter provisions.

That the cases before cited, and the law generally clearly establishes the principle, that municipal corporations are the creatures of the Legislature, may be controlled after the incorporation by general laws, we think is too clear to require further recitation of authorities. The case at bar, however, does not even go that far; the Charter delegates to the City of Nevada certain enumerated powers, among which is the power "to provide for supplying the City with water." Is power so delegated meaningless, as it would be, if the only power here given, was restricted or bounded by the annual income, or by the provision that the Trustees could not incur indebtedness exceeding $2000?

Even if it be admitted that the limitation contained in the City Charter prior to the passage of the Act of 1889 and the amendments thereto, was a clear limitation upon the right of the City, by vote or otherwise, to incur a municipal indebtedness, yet our contention is that as the Legislature, by the Act of 1889, has provided that *any city* may incur an indebtedness up to one-fifteenth of the assessed value of all its property,

for public improvements, etc., that such Act, being the last expression of the Legislative will, must control.

The question at issue in this case is not, what are the powers of the City, but, has the Legislature the power by general law to confer upon the municipal corporations organized prior to the adoption of the new Constitution, additional powers to those included in their Charter ?

Section 6 of Article 11, of the Constitution, expressly declares that "all municipal corporations are subject to general laws ?

It is elementary that the Constitution of the State is not a delegation of powers, but a limitation, and in so far as the Legislature is not inhibited by the Constitution of the State or of the United States, it possesses supreme power over all matters of legislation.

A consideration of the provision of the Charter, and of the Act of 1889, and Acts amendatory thereof, will readily show that they are not in conflict with each other. The Charter of the City limited the rights of the *Trustees* to incur an indebtedness over the sum of $2000, while the Act of 1889 enlarged that right for certain purposes and conferred upon the *City* the right to incur an indebtedness for the purposes therein men-

tioned, in the manner therein provided, of any amount not exceeding one-fifteenth of its assessed valuation.

It would seem to follow as a necessary conclusion that if the Legislature had a right to restrict the corporation in the matter of incurring indebtedness, it possesses the right to enlarge that restriction.

We concede that so far as the *incorporation, organization and classification* of cities are concerned the power of the Legislature to affect them in these particulars is limited by the Constitution, but not otherwise, except that its power must be exerted by the passage of general laws.

To hold that the Act of 1889 is a general law, and in the same breath to insist that it does not apply to all municipal corporations, would seem illogical.

Counsel for Plaintiff contend that by reason of the provisions of the General Municipal Act of 1883 and of the Constitution, municipal corporations can only be affected as to their incorporation, organization and classification by a popular vote of the particular municipality, and then insist that unless the City of Nevada shall, by a popular vote, reorganize under the General Municipal Act of 1883, the old Charter of 1878 must remain intact, and that the power of the Board of Trustees of the City or of the municipality cannot be en-

larged by a general law such as the Act of 1889 and the Acts amendatory thereof.

The fallacy, as it seems to us, of the argument presented is, that the Act of 1889, authorizing the incurring of municipal indebtedness, for the purposes therein enumerated, does not, in any sense, interfere with the *incorporation, organization and classification* of a city. Indeed, Counsel do not claim that the Act of 1889 affect municipal corporations in these particulars. If it does not, then clearly no inhibition has been pointed out against the power of the Legislature in passing the Act of 1889 and making it applicable to all municipal corporations. It is an elementary rule applicable to all municipal corporations, that they possess all such powers as is necessary to carry into effect the objects of their formation, except in so far as they are limited by the provisions of their Charters or by Acts of the Legislature.

It is also elementary that an Act of the Legislature of one Session is not controlling or binding upon subsequent Legislatures. Such former Acts may be amended, enlarged or wholly repealed, so long as the Legislature is not, itself, incapacitated by some Constitutional provision.

Applying the foregoing rules to this case it seems clear that it must be held that while the Legislature of

1878 had a right to limit the incurring of indebtedness by the City of Nevada, the Legislature of 1889 and subsequent Legislatures had an equal right to enlarge the powers of the City in that direction.

Counsel for Complainant cites the case of the People vs. Pond, 89 Cal., Page 141, in support of their contention in this case. We submit that a most casual reading of that case will show that it has no application here. There the contention was that the Consolidation Act of the City and County of San Francisco had been changed by a general law. The Supreme Court determined simply that the incorporation and organization of the city could not be changed by a general law of the Legislature, but that it required a vote of the people. No such question is presented here.

The Complainant alleges in her Bill that she is "a tax-payer and owner of property in the City of Nevada," but the value of the property or the amount of taxes paid does not appear. See Trans. 3.

Again, on page 23, Trans., it is averred that the acts of the Trustees "will greatly affect the market value of the property of your Oratrix * * * and subject (the same) to said special tax, and that she will thereby be irreparably damaged." Nowhere in the Complaint does the market or other value of the property of the

Oratrix, or the amount of taxes which she will be obliged to pay, appear—nor does she claim she had any franchise or contract which will be violated.

Complainant also avers "that said City of Nevada * * * are already furnished and supplied with pure, fresh water * * *; that the interests of said City of Nevada * * * do not require the incurring of said indebtedness."

The question of whether the public health or comfort requires a water supply cannot be determined by private citizens.

St. Tammany Water Works Co. vs. New Orleans. 120 U. S., 64.

Appellant has specified 14 assignments of error. By stipulation of Counsel filed in this case, Assignment No. VII. is waived. As all other errors are predicated upon a single proposition, viz: that the City has no power to issue the bonds in question here, we do not deem it necessary to reply to each separately.

In conclusion we submit that the decree of the Circuit Court should be affirmed.

A. D. MASON,
J. M. WALLING,
Solicitors for Appellees.